

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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In the Matter of Petition of Bellsouth)	WC Docket No. 04-405
Telecommunications, Inc. For Forbearance)	
Under 47 U.S.C. 160 (c) From Application)	Comments
Computer Inquiry and Title II Common)	
Carriage Requirements)	
 To: The Commission)	
CC: Bellsouth		

VIA the ECFS

COMMENTS OF FRANCOIS D. MENARD

I respectfully submit the following comments on the Petition of Bellsouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160 (c) From Application of Computer Inquiry and Title II Common Carriage Requirements. (“the Petition”).

These comments were developed by a Canadian citizen who has a commercial interest in the removal of undue barrier to entries for Canadian firms for entering the US Market in the provision of next generation telecommunications services such as VoIP.

In these Comments, I am requesting Bellsouth Telecommunications, Inc. to explain how the granting of forbearance through the Petition would serve the public interest and would assure that the commercial activities of Bellsouth Telecommunications, Inc remain in Compliance with Chapter 13 Articles 1302 and 1303 of the North American Free Trade Agreement, copies of which are included in this document.

Based on the responses of Bellsouth Telecommunications, Inc., I intend to elaborate on the necessary remedies through the filing of Reply Comments on January 19, 2005.

Introduction

1. I am in receipt of a petition dated October 27th 2004 by Bellsouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160 (c) From Application of Computer Inquiry and Title II Common Carriage Requirements. (“the Petition”)
2. I am also in receipt of the FCC Order DA-3507 dated November 3, 2004, inviting comments by December 20, 2005 and Reply Comments by January 19, 2005.
3. I note that pursuant to the US Administrative Procedure Act^{1,2}, **anyone** can provide comments, irrespective of national origin or country of residence.
4. I submit that the petition has broad public policy issues that transcend the boundaries of the United States as the granting of the forbearance would likely restrict competitive entry in the United States of America in the territory of Bellsouth Telecommunications Inc. (Bellsouth) by corporations under Canadian control (i.e. *Canadian firms*).
5. I am an intervener in this proceeding as the granting of the petition would cause irreparable harm to potential entry of the Canadian firms to which I have a direct or indirect commercial interest for or into.
6. A formal description of the commercial interests that I have, or may have in the future are irrelevant to the issue of whether the commercial activities of Bellsouth would remain in compliance with the dispositions in articles 1302 and 1303 of the North American Free Trade Agreement, should the FCC decides to grant the petition of Bellsouth.
7. Nonetheless, for the sole purpose of clarity, I am specifically questioning whether, upon the granting of forbearance, Bellsouth would have the right incentives to allow interconnection to its VoiceWing VoIP infrastructure on terms and conditions that are just and reasonable.
8. The motivations behind the present intervention lie in the fact that I have reasonable suspicions that Bellsouth will force Canadian VoIP service providers to interconnect to its

¹ <http://www.cybertelecom.org/faqs/apa.htm>

VoiceWing service through prohibitively expensive legacy time division multiplexing PSTN interfaces rather than allow the direct termination of traffic using native VoIP technology, thereby foreclosing entry.

9. I submit that if the intention of Bellsouth to allow Canadian VoIP service providers to interconnect to the Bellsouth VoiceWing VoIP service through the Internet, then Bellsouth has the opportunity to state on the present public records its intention and to provide details on the terms and conditions to which it would allow next-generation VoIP-based interconnections to its facilities.

NAFTA

10. Bellsouth is requested to detail whether its commercial operations, upon the granting of the petition, would remain in Compliance with articles 1302 and 1303 of Chapter 13³ of the North American Free Trade Agreement, which state as follows:

Article 1302: Access to and Use of Public Telecommunications Transport Networks and Services

1. Each Party shall ensure that persons of another Party have access to and use of any public telecommunications transport network or service, including private leased circuits, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms and conditions, including as set out in paragraphs 2 through 8.
2. Subject to paragraphs 6 and 7, each Party shall ensure that such persons are permitted to:
 - (a) purchase or lease, and attach terminal or other equipment that interfaces with the public telecommunications transport network;
 - (b) interconnect private leased or owned circuits with public telecommunications transport networks in the territory, or across the borders, of that Party, including for use in providing dial-up access to and from their customers or users, or with circuits leased or owned by another person on terms and conditions mutually agreed by those persons;
 - (c) perform switching, signalling and processing functions; and
 - (d) use operating protocols of their choice.
3. Each Party shall ensure that:
 - (a) the pricing of public telecommunications transport services reflects economic costs directly related to providing the services; and
 - (b) private leased circuits are available on a flat-rate pricing basis.

Nothing in this paragraph shall be construed to prevent cross-subsidization between public telecommunications transport services.

² http://biotech.law.lsu.edu/Courses/study_aids/adlaw/

³ <http://www.mac.doc.gov/nafta/chapter13.html>

4. Each Party shall ensure that persons of another Party may use public telecommunications transport networks or services for the movement of information in its territory or across its borders, including for intracorporate communications, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Party.
5. Further to Article 2101 (General Exceptions), nothing in this Chapter shall be construed to prevent a Party from adopting or enforcing any measure necessary to:
 - (a) ensure the security and confidentiality of messages; or
 - (b) protect the privacy of subscribers to public telecommunications transport networks or services.
6. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications transport networks or services, other than that necessary to:
 - (a) safeguard the public service responsibilities of providers of public telecommunications transport networks or services, in particular their ability to make their networks or services available to the public generally; or
 - (b) protect the technical integrity of public telecommunications transport networks or services.
7. Provided that conditions for access to and use of public telecommunications transport networks or services satisfy the criteria set out in paragraph 6, such conditions may include:
 - (a) a restriction on resale or shared use of such services;
 - (b) a requirement to use specified technical interfaces, including interface protocols, for interconnection with such networks or services;
 - (c) a restriction on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another person, where the circuits are used in the provision of public telecommunications transport networks or services; and
 - (d) a licensing, permit, registration or notification procedure which, if adopted or maintained, is transparent and applications filed thereunder are processed expeditiously.
8. For purposes of this Article, "non-discriminatory" means on terms and conditions no less favorable than those accorded to any other customer or user of like public telecommunications transport networks or services in like circumstances.

Article 1303: Conditions for the Provision of Enhanced or Value-Added Services

1. Each Party shall ensure that:
 - (a) any licensing, permit, registration or notification procedure that it adopts or maintains relating to the provision of enhanced or value-added services is transparent and non-discriminatory, and that applications filed thereunder are processed expeditiously; and
 - (b) information required under such procedures is limited to that necessary to demonstrate that the applicant has the financial solvency to begin providing services or to assess conformity of the applicant's terminal or other equipment with the Party's applicable standards or technical regulations.
2. A Party shall not require a person providing enhanced or value-added services to:
 - (a) provide those services to the public generally;
 - (b) cost-justify its rates;
 - (c) file a tariff;
 - (d) interconnect its networks with any particular customer or network; or

(e)conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications transport network.

3. Notwithstanding paragraph 2(c), a Party may require the filing of a tariff by:

(a)such provider to remedy a practice of that provider that the Party has found in a particular case to be anticompetitive under its law; or

(b)a monopoly to which Article 1305 applies.

11. I request that Bellsouth details its response pursuant to each paragraph and subparagraph of articles 1302 and 1303, with specific emphasis on not omitting to address any issues listed therein.

12. The FCC must surely realize that a gigantic canyon is emerging between the pro-competitive activities of the CRTC and the recent deregulation activities of the FCC. I am particularly puzzled by the fact that US firms deciding to enter the Canadian market would be capable of doing so on terms and conditions that are vastly better than in the converse situation.

13. The present intervener notes the dissenting comments of Commissioner Copps accompanying several of the most recent Orders of the Commission.

14. It is a fact that currently, the market share of the incumbent telephone and cable carriers in the USA remains pretty much the same than that their Canadian counterparts. This does not prevent the CRTC to still today, find market power in the fact that incumbent telephone and cable carriers control over 99% of all residential wireline broadband access facilities.

15. Given the aforementioned, I find that the position of the FCC is at odds with the one of the CRTC. I note that the proposed strategy of the FCC to de-regulate through service re-classification (such as declaring cable modem telecommunications services to be information services) rather than from clear evidence of the absence of market power, is an issue that still has yet to complete judicial review based on the fact that the US Supreme Court has granted⁴ on December 3rd 2004 the Certiorari requested by the FCC in the Brand-X case.

⁴ <http://www.supremecourtus.gov/orders/courtorders/120304pzt.pdf>

CONCLUSION

16. I submit that it is at best premature, if not outright grossly improper, for Bellsouth to attempt to game the regulatory process by short-cutting the current Brand-X judicial review process through the present petition.

17. I further note that in WC Docket 04-29, the FCC postponed responding to the petition filed by SBC Communications Inc. (SBC) on February 5, 2004, requesting forbearance from application of Title II common carrier regulation to networks relying on the Internet Protocol (IP), the capabilities and functionalities of those networks, and services and applications utilizing those networks to facilitate communications (collectively, “IP Platform Services”).

18. I note that the FCC, by postponing making a decision, has effectively prevented SBC to game the regulatory process by requesting forbearance for IP-enabled services in advance of the FCC rendering a decision in WC 04-36 (IP-enabled Services NPRM), but in the same manner, has created the expectation in the market that the Commission would soon be ready to issue a decision in the WC 04-36 (IP-enabled Services NPRM).

19. I submit that the matters in Dockets 02-33 and 04-36 must not be given a priority over yet another attempt to seek forbearance that is not backed by a complete judicial review or irrefutable evidence of the absence of market power.

20. I further submit that in order for the FCC be prepared to grant the petition of Bellsouth, it is statutorily required to launch an inquiry into its market power through a public notice process

21. The renewed pro-competitive regulatory activity of the CRTC is at odds with the converse course of action that the FCC is taking.

22. Economic theory is clear about the fact that competitive entry in the telecommunications industry can only occur in a context where new entrants can have lower incremental costs than the incumbents. This requires that new entrants be self-disciplined in financing their competitive entry from proceeds generated from services making use of unbundled network elements. It is

the lack of such discipline which is responsible for the Telecom Crash of 2000 and investors have learned it the hard way, thence their reluctance to further finance competitive entry.

23. Speeds achievable on increasingly faster wireline broadband is expected to reach speeds of 26 mbps on twisted pair ILEC copper (using ADSL2+ FTTN) and 30 mbps coaxial MSO copper (using DOCSIS 2.0/3.0) by 2006.

24. Wireless and BPL technologies will continue to lag several years behind wireline technologies well into the future. This should normally be enough to convince the FCC to regulate based on current assessment of market share and market power, rather than based on an elusive future of inter-modal competition. The solution is to ensure that a third entrant, i.e. the municipal sector, is allowed to massively invest into better infrastructures than those based on copper and to ensure that this third entrant is protected from anticompetitive below-cost targeted promotions coming from the established incumbent carriers under a duopolistic death match.

25. The FCC is statutorily bound to promote sustainable competition which clearly does not exist in the duopoly wireline broadband environment that prevails today.

26. For these reasons, I submit that the FCC should deny the petition.

Respectfully submitted,

/s/

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